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On or about April 19, 1988, Pacolet and Duke entered into a Purchased Power Agreement under which Pacolet sells and Duke buys energy and capacity, based on this Commission's Schedule PP (SC) for a term of five (5) years, with an automatic renewal, unless terminated by either party. The electricity sold to Duke is generated by an 800 KW hydro-power facility, located on the Pacolet River in Spartanburg County, South Carolina, known as

Clifton No. 1. This facility is a qualifying small power production facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA).

By letter dated June 24, 1994, Pacolet requested that Duke enter into a contract for a term of not less than fifteen (15) years for Clifton No. 1 with fixed rates equal to the full avoided costs of Duke. Duke denied the request. By letter dated January 20, 1995, Pacolet again requested a fifteen (15) year contract using rates equal to the full avoided costs of Duke prior to June 24, 1994. By letter dated March 6, 1995, Duke offered a long-term contract with fixed rates as filed with the North Carolina Utilities Commission on November 28, 1994, which, according to Pacolet, were lower than the rates based on the full avoided costs filed prior to June 24, 1994. Subsequently, Pacolet filed its complaint with this Commission, and requested a hearing on the matter, which was granted.

A hearing was held on January 24, 1996 and February 21, 1996 in the Commission's offices. The Honorable Guy Butler, Vice-Chairman, presided. Pacolet was represented by William E. Booth, III, Esquire. Booth presented the testimony of Charles B. Mierek, Nancy Mierek, and Tiane L. Sommer (rebuttal). Duke was represented by Richard L. Whitt, Esquire and Jeffrey L. Trepel, Esquire. Duke presented the testimony of Kenneth B. Keels, Jr. (direct and surrebuttal) and Steven K. Young. The Commission Staff (the Staff) was represented by F. David Butler, General Counsel.

After a full hearing and due consideration of all matters of fact and law, the first vote on this matter was taken by the Commission on June 11, 1996. As a result, the Commission adopted the finding that a ten (10) year contract be granted to Pacolet with Duke at fixed rates to be based on the rates approved for Duke in the upcoming avoided cost hearing to be held under Docket No. 95-1192-E. The request to have Duke pay Pacolet's legal and consulting fees was denied. Duke subsequently filed a Motion for Reconsideration of the matter. On July 2, 1996, the Commission granted reconsideration, and the ten year contract period originally granted by the Commission was modified to seven and one-half (7½) years. Pacolet then filed for reconsideration of the Commission's July 2, 1996 holding, stating that the fifteen (15) year contract period was a reasonable term under Federal law, and that the QF was entitled to the full avoided cost of Duke at the time that the obligation was incurred, according to Pacolet, which was June 24, 1994. Further, Pacolet alleged that since Duke had acted in "bad faith," that costs of legal and consulting fees should have been assessed against Duke. On July 16, 1996, the Commission voted to deny Pacolet's Motion for Reconsideration.

Since the legal issues were similar in all three votes, we hold that the reasoning as stated below applies to all three votes taken by the Commission.

The major issues contained in this case are threefold, and may be described as follows:

First, is Pacolet entitled to a long-term contract for the

sale of its power to Duke, specifically, for a term of fifteen (15) years under the Public Utility Regulatory Policies Act of 1978?

Second, if Pacolet is so entitled, what rate should be applied?

Third, is Pacolet entitled to have its costs paid for the filing and pursuit of its complaint against Duke?

Pacolet first argues that it was entitled to a contract with Duke for a term of fifteen (15) years. The Commission has examined the testimony in this case and the law, and holds that PURPA does not specify a minimum or maximum length of time under which energy or capacity payments should be fixed, or otherwise require utilities to offer contracts of any specific duration. Pacolet's witness, Ms. Sommer acknowledges this point, and also noted that she was unaware of any court or commission decisions setting a minimum or maximum limit for fixed-payment QF contracts.

Duke's witness, Keels, testified that Pacolet is not entitled as a matter of Federal Law to a fifteen (15) year contract. Mr. Keels stated that PURPA and the Federal Energy Regulatory Commission (FERC) regulations do not require long-term, fixed rate contracts, and that this Commission has discretion in implementing PURPA and the FERC rules regarding contract terms and rates. Mr. Keels further testified that this Commission's determination as to whether to require a specific contract term or to fix rates should be guided by the requirement that rates paid to QF's must be "just and reasonable to the electric consumers of the electric utility

and in the public interest." 18 C.F.R. §292.304(a)(1)(i).

Duke provided testimony showing the risks to electric consumers from long-term fixed rate contracts. Also, this Commission has not previously mandated QF contracts with specific minimum durations. The Commission acknowledges the evidence presented in this Docket pertaining to the difficulties of forecasting avoided costs accurately over long-term contracts which could result in overpayments to QFs, and that such overpayments in South Carolina would eventually result in higher rates to Duke's customers. The Commission has discretion in the setting of the length of contracts to QFs, and it has exercised that discretion in this case in ordering a contract with a term of seven and one-half (7½) years. Pacolet presented no evidence which demonstrates that this is an inappropriate term. The Commission is cognizant of the need for a fixed contract in order that QFs may obtain commitments from financial institutions in the financing of various operations. Therefore, based on the evidence and testimony of record as to specific facts of the case, and the discretion of the Commission, the Commission finds that a term of seven and one-half (7½) years for a contract between Pacolet and Duke is appropriate.

The Commission originally held that ten (10) years was an appropriate term for such a contract. The Commission re-examined this holding, however, in light of the testimony provided by Duke as to various risks to electric consumers from long-term fixed rate contracts. There is a danger in a contract of long-term

duration that the avoided cost rate awarded by the Commission may vary substantially from the Company's actual avoided cost as filed with this Commission over a long term. Again, however, we recognize the reasonability of a fixed contract in terms of obtaining financing for various QF operations. Therefore, we believe that, upon a further balancing of the two concerns, a term of seven and one-half (7½) years is an appropriate term.

Secondly, Pacolet argues that a legally enforceable obligation occurred on June 24, 1994, when, it made a request for a new Purchased Power Agreement, and that any rate awarded in this proceeding should be based on Duke's full avoided costs as of June 24, 1994. Both Pacolet and Duke agree that the present Purchased Power Agreement, which has not been terminated, contains a provision requiring written notice, thirty (30) months prior to termination. The Commission holds that the June 24, 1994 letter from Pacolet, at most, is a request for termination of the existing Purchased Power Agreement by Pacolet. Accordingly, the Commission holds that Duke and Pacolet may enter into a new Purchased Power Agreement effective in January 1997, or thirty (30) months following the June 24, 1994 letter from Pacolet. The Commission holds that the June 24, 1994 letter from Pacolet, inquiring about the availability of new Purchased Power Agreements did not, standing alone, create a legally enforceable obligation between the parties. The Commission declines to find that a QF can terminate an existing contract before its term ends, and create a legally enforceable obligation, by simply writing a

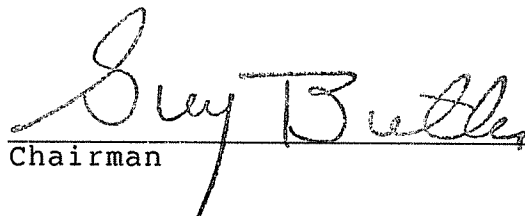
letter to a utility inquiring about what new rates and terms are available. Pacolet did not provide this Commission with any evidence to support its contention that a legally enforceable obligation was created by its writing of the June 24, 1994 letter to Duke. Therefore, since no legally enforceable obligation had occurred pursuant to the June 24, 1994 letter, the Commission was justified in setting as a rate for the seven and one-half (7½) year fixed contract the avoided cost rate which shall be awarded to Duke as a result of the avoided cost hearing in August 1996 in Docket No. 95-1192-E. In the absence of the occurrence of a legally enforceable obligation, the rate becomes a matter of judgment for determination by the Commission, based on the evidence. We think that the rate as determined in the avoided cost proceeding will be the most accurate rate for use in the contract, since it will be based on expert testimony presented to the Commission in that Docket as to the most current rate for avoided costs. The Order(s) in Docket No. 95-1192-E will be issued in somewhat close proximity to any January 1997 contract which may be created between the parties.

Lastly, Pacolet contends that this Commission should have assessed costs against Duke because Pacolet brought this complaint to the Commission. Pacolet's witness, Mr. Mierek, testified that he felt that Duke acted in bad faith in its negotiations with Pacolet. Duke presented evidence to show that it responded to each inquiry from Pacolet, and provided evidence for this Commission outlining its efforts to reach an agreement with


Pacolet. On balance, this Commission holds that there is no evidence to support a finding of bad faith, that no assessment of costs against Duke is warranted, and the Commission has not found sufficient merit to the allegations of the complaint as to bad faith.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Deputy Executive Director
(SEAL)